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Challenging the Impact of FIOST Clauses on Cargo Interests

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ABSTRACT

Loss of, or damage to goods is a frequent occurrence in the shipping industry, which may often occur as a result of improper cargo-handling operations during loading, discharging or even stowing. This highly concerns cargo interests, as they will seek to reimburse their loss from their carriers under bills of lading. Often, the bill of lading may well contain terms of a charterparty by way of incorporation that allow the carrier to contract out their cargo-related operations. Once this is the case, the cargo interest is unjustly left without a remedy for loss of, or damage to his goods vis-à-vis the carrier under English law. This paper, instead of challenging the correctness of the law firmly established concerning the transfer of these obligations via Free In and Out Stowed and Trimmed (FIOST) clauses, rather, aims to propose ideas to tackle the impact arising out of the status quo under English law. Finally, it offers some plausible suggestions for cargo interests to surmount this undesired outcome.

KEYWORDS

Fiost clauses; The Hague Rules; Cargo Interests; Shipowners; Charterers

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INTRODUCTION

The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature [hereinafter Hague Rules] or the Hague-Visby Rules[1] as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels in 1968 apply either by way of paramount clause agreed in or compulsorily, by force of law to the contracts contained or evidenced in bills of lading. The Rules prescribe the rights and liabilities arising out of the desired voyage starting from loading to discharge operations, including the core obligations of the carrier, like providing a seaworthy vessel[2] and other responsibilities caring for the cargo such as loading, handling, discharging and stowage operations.[3] Hence, when failing to deliver one of these responsibilities, the carrier may become subject to liabilities against cargo interests under the bill of lading.

However, sometimes the shipowner may not be willing to undertake some of these obligations that would normally fall upon him as defined under the Rules. Accordingly, as a result of freedom of contract, when drafting charter party terms, by virtue of free-in and free-out clauses, these responsibilities may have been shifted to charterers who often are not the bill of lading holders. Sometimes even a term may have been inserted into the bill of lading transferring these responsibilities to cargo interests, like shippers or receivers. And it is not uncommon in practice that some germane terms of the charterparty may have as well been incorporated into the bill of lading by general words of incorporation. When this is the case, under English law, as it will be shown below, cargo interests' claims *vis-à-vis* carriers arising out of breach of these obligations appear to be falling short of success, as they are allowed to contract out them. It is, however, submitted that this undermines the balance that is struck out by the Rules between cargo interests and carriers, making the former weaker and the latter even stronger, as the former are left without a remedy, whereas the faulty party escapes liability.

It is worth noting that by no means, does this paper seek to challenge the correctness of the law firmly established concerning the transfer of these obligations via Free In and Out Stowed and Trimmed [hereinafter FIOST] clauses, but rather aims to

[1] The Hague Rules of 1924 are not in force in the UK. The Hague-Visby Rules as amended by the Brussels Protocol 1968 are in force in the UK by the Carriage of Goods by Sea Act 1971. Unless otherwise stated, the arguments are to cover both the Hague and the Hague-Visby Rules, as the relevant provisions on the subject of this paper bear no difference under both the Hague and the Hague-Visby Rules.

[2] Art.III(1) of the Rules prescribes an obligation that requires the carrier to exercise due diligence before or at the beginning of the voyage to make the vessel seaworthy to undertake the intended voyage. "Seaworthiness" covers all aspects that put the vessel in a condition to perform properly the contractual voyage. For detailed explanations on seaworthiness, see *The Eurasian Dream* [2002] EWHC 118; [2002] 1 Lloyd's Rep 719, 735.

[3] Art.III(2).

propose ideas to tackle the undesired outcome arising out of the *status quo*. To do so, first, it shall set out in brief, the purpose of FIOST clauses and its impact between carriers and cargo interests under the bill of lading contract. Secondly, and more importantly, it shall seek to surmount the undesired outcome for cargo interests by offering plausible suggestions.

1. FIOST CLAUSES AND THEIR INCORPORATION INTO BILLS OF LADING

Cargo-related obligations such as loading, stowing and discharging, in the absence of an express provision, fall upon the shipowner rather than the charterer in common law. Though, this is hardly the case in practice, in most cases, parties are not silent on this matter in their contracts. Under charter parties, the shipowner and the charterer are free to draft or negotiate any term in allocating their respective responsibilities among themselves, such as these cargo-related operations for the manner in which they are to be carried out.

Free In and Out Stowed [hereinafter FIOS] or FIOST clauses or other variations are often drafted in charterparties.[4] Depending on the wording used, these clauses might have different impact on the rights and responsibilities of the parties. In an unqualified form of FIOS or FIOST clause, "free" only indicates that it is free of cost.[5] This is to say, such a clause is not capable of transferring the risk of these operations, and therefore it does not discharge the shipowner from responsibility against cargo interests.[6] Although, an effectively drafted clause may transfer the risk of these operations, making the shipowner relieved of responsibility.[7] Whereas the latter type enables the shipowner to contract out these obligations and hence the responsibility, the former type does not offer shipowners

[4] FIO (free in and out), FIOS (free in and out stowed), FIOST (free in and out stowed trimmed), FILO (free in liner out), FISLO (free in stowed liner out), etc. On FIOS or FIOST clauses in general see, Richard Aikens et al., Bills of Lading 338-9 (2nd ed. 2016) ;Bernard Eder et al., Scrutton on Charterparties and Bills of Lading 344-5 (23rd ed. 2015) ; 3h Paul Todd, Principles of the Carriage of Goods by Sea 261-2, 319-22 (1st ed. 2016) ;Julian Cooke et al., Voyage Charters 14.36-14.45 (4th ed. 2014) ; Simon Baughen, Shipping Law 106-9 (7th ed 2019). For more detailed analysis of the nature and scope of FIOST clauses see, Ilian Djadjev, The Obligation of the Carrier regarding the Cargo 101-47 (2017).

[5] *Jindal Iron and Steel Co Ltd v. Islamic Solidarity Shipping Co Jordan Inc (The Jordan II)* [2003] [2003] EWCA Civ 144; 2 Lloyd's Rep 87, 103. See also, *The Mohave Maiden* [2015] EWHC 1747 (Comm).

[6] For an example such a clause, see clause 8 of the NYPE, "...and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain..." *See* also *Sea Master Shipping Inc. v. Arab Bank (Switzerland) Ltd* [2020] EWHC 2030 (Comm).

[7] *See*, clause 5 of the GENCON charter party, "the cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured by the Charterers, free of any risk, liability and expense whatsoever to the Owners".

a way out from responsibilities against cargo interests. It thus appears that there is no invariable general outcome from these clauses and accordingly cargo interests' right of recourse against carriers is highly dependent upon the wording of each clause.

Although FIOST clauses are sometimes inserted into bills of lading, they might often be incorporated from a charterparty. Use of general words of incorporation clause in the bill of lading is not uncommon, such as "all terms and conditions, liberties and exceptions of the charterparty . . . ".[8] The general rule is that as long as clauses are germane to the subject matter of the bill of lading (ie., carriage or delivery of the goods or the payment of freight and demurrage), those germane terms of the charterparty would be treated as incorporated into the bill of lading.[9] As for incorporation of FIOST clauses, in *the Eems Solar*, general words of incorporation were held to be successfully incorporated into a FIOST clause of a charterparty into the bill of lading.[10] Sometimes such incorporated clauses may require a degree of manipulation of the words so as to fit exactly the bill of lading. However, it must be said that the English courts have shown no reluctance in manipulating such incorporated clauses that are considered germane to fit them into bills of lading.[11] In supporting this argument, in *the Eems Solar,* manipulation was found to be unnecessary for a FIOST clause – which was assumed to be germane - relieving the shipowner of the cargo-handling obligations, where the charterers had them imposed on.[12] Though, this does not necessarily mean that an incorporated FIOST clause always sits well with the other terms of the bill of lading, which will be discussed below.

2. CONTENTION BETWEEN FIOST CLAUSES AND THE HAGUE RULES

As stated above, FIOST clauses can be successfully incorporated into bills of lading by the use of general words. If the incorporated clause did not only transfer of cost but also the risk of cargo-related operations to the shipper, the receiver or even to the charterer, a

[8] For examples of general words of incorporation clauses, see, *Skips A/S Nordheim v. Syrian Petroleum Co and Petrofina SA (The Varenna)* [1984] Q.B. 599; *Federal Bulk Carriers Inc v. C Itoh & Co Ltd (The Federal Bulker)* [1989] 1 Lloyd's Rep. 103.

[9] *TW Thomas & Co Ltd v. Portsea SS Co Ltd (The Portsmouth)* [1912] AC 1; *Yuzhny Zavod Metall Profil LLC v. Eems Beheerder BV (The Eems Solar)* [2013] 2 Lloyd's Rep 487.

[10] *Yuzhny Zavod Metall Profil LLC v. Eems Beheerder BV (The Eems Solar)* [2013] 2 Lloyd's Rep. 487, [94-95]. For a detailed commentary on this case see, Paul Todd, *Hague Rules and Stowage*, Lloyd's Mar.& Com. L Q. 139 (2014).

[11] Though where manipulation was not possible for a demurrage clause, see *Miramar Maritime Corp v. Holborn Oil Trading (The Miramar)* [1984] A.C. 676.

[12] *The Eems Solar* [2013] 2 Lloyd's Rep 487, [94-95].

tension would be deemed to arise between that clause and art.III(2) of the Rules in principle, as it imposes the obligations to load, stow and discharge onto the carrier[13] under the bill of lading. Therefore, a question arises at this point: would an incorporated FIOST clause lowering the carrier's cargo-handling responsibilities prevail over art.III(2)?

The Hague or the Hague-Visby Rules were created to strike a balance between the weak party (the cargo interest) and the party that would enjoy upper bargaining power (the carrier). In order to find a balance between them, the Rules therefore lay out standard liabilities of the carrier *vis-à-vis* the cargo interest. So as to protect cargo interests as the weaker party, thus art.III(8) of the Rules reads:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

The provision goes to the root of the underlying reason that caused the creation of the Rules; where the carrier seeks to lower his liability provided in the Rules by other contractual terms drafted or incorporated, these terms would be rendered void and of no effect hereunder. As for FIOST clauses, although it might seem plausible at first sight that they should be struck out by art.III(8), once the carrier seeks to relieve himself of responsibilities under art.III(2), such as for loss or damage to goods arising from improper stowage, the approach taken by the English courts may prove this wrong.

Devlin J in *Pyrene v Scindia* held that art.III(2) does not define the scope of the carriage contract, but the terms upon which the service is to be performed.[14] This is to say, art.III(2) by no means is to be construed to override freedom of contract that the parties may enjoy under the bill of lading, when reallocating the cargo-related operations. The proposition of Devlin J was later affirmed by the House of Lords in *Renton v Palmyra*.[15] Thus, the terms incorporated shifting these responsibilities to a third party are construed as the terms merely defining the scope of the contract, and therefore they appear to be not falling within the ambit of art.III(8). This was the case both in *the Jordan*

[13] It is assumed that the shipowner is the contracting carrier under the bill of lading (shipowner's bill), which is signed, by the master or other person as agent for the shipowner. If the contracting carrier is the charterer who is also the performing party of the cargo-related operations via FIOST clauses, the cargo interest will then be able to sue the charterer/contracting carrier for the breach of art.III(2) under the bill of lading. On identification of the carrier under the bill of lading see, Eder, *supra* note 4, at 115-118.

[14] *Pyrene Co Ltd v. Scindia Steam Navigation Co Ltd* [1954] 2 Q.B. 402, 418.

[15] *GH Renton & Co Ltd v. Palmyra Trading Corp of Panama (The Caspiana)* [1957] AC 149, 170, 173, 174 and 176.

II[16] and *the Eems Solar*.[17] In the former, the charterparty contained a FIOST clause and another clause reading "Shipper/Charterers/Receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel . . . " and the bill of lading incorporated the terms of this charterparty. Following the discharge, the cargo was found to be damaged. The issue revolved around whether the shipowner was liable for damage occurred during loading, stowing or discharge. Whilst the charterers brought a claim against the shipowner under the charterparty incorporating the Hague Rules, the shipper and the consignee sued under the bills of lading. Having followed the *ratio decidendi* of *Renton v Palmyra* and *Pyrene v Scindia*, in the House of Lords held that the terms transferring cargo-related responsibilities such as loading, stowing or discharging from shipowners to shippers, consignees, charterers were not caught by art. III (8).[18]

In *the Eems Solar*, the shipowners were sued under the bill of lading, which incorporated terms of the charterparty including a FIOST clause transferring the cargo-related responsibilities from the shipowner to the charterer by the cargo owners for damage caused to a cargo of steel sheets by adverse weather. The cargo owners submitted that the shipowners were in breach of art.III(1) and (2), as the cargo was improperly stowed to protect it from damage during voyage. They further argued that the incorporated FIOST clause would be rendered null and void under art.III(8), as it would discharge the shipowner from responsibility under the Rules. First, it was found that the damage to the cargo was caused by improper stowage and not unseaworthiness. Though, having followed *Renton v Palymyra* and *the Jordan II*, the court eventually held that the shipowner was entitled to contract out the cargo-related operations, and equally the shipowner was relieved of responsibilities arising from these operations. It is therefore safe to assume that a FIOST clause may not be invalidated by art.III(8) under English law, accordingly it is considered consistent with the relevant provisions of the Rules.

3. THE APPROACH TAKEN BY OTHER JURISDICTIONS

Under English law, as the authorities cited above illustrate, cargo interests appear to be destined arguing without success that FIOST clauses are caught by art.III(8), as shipowners are entitled to freely negotiate their contract including reallocation of

[16] *The Jordan II* [2005] 1 W.L.R. 1363; [2005] 1 Lloyd's Rep. 57, [14].
[17] [2013] 2 Lloyd's Rep 487, [68], [100].
[18] *The Jordan II* [2005] 1 W.L.R. 1363; [2005] 1 Lloyd's Rep 57, [12].

cargo-related operations under bills of lading. Though the author opines that it is necessary to re-strike the balance between those parties, as the standard protection provided by the Rules for cargo interests to this extent are undermined by English case law. Scrutinising other jurisdictions might provide some assistance to see if there is any useful solution for this purpose.

To start with the Commonwealth countries, the approach taken by the English courts seems to have been followed by Australia,[19] New Zealand,[20] India[21] and Pakistan.[22] Italian law can also be said to show similarities to the English approach.[23] On the other hand, in South Africa, it was held that cargo-handling operations are non-delegable duties of the carrier and accordingly, cargo interests are not denied redress against carriers in that respect.[24] As for French law, the view adopted is that FIOST clauses are only capable of transferring the risk of cost for cargo-handling operations such as loading, trimming, discharging, stowing etc., meaning that the carrier will not be entitled to contract out the risk of these operations, and accordingly may not be relieved of liability arising from damage done to goods resulting from these operations.[25]

In respect of Dutch law, it is safe to contend that FIOST clauses are capable of transferring the risk and responsibilities of these operations along with the cost.[26] On the other hand, there is no predominant view adopted by the courts in the United States.

Whereas some circuits evidently favoured the view that unless the carrier supervises or takes no part in these operations, he might contract out of responsibility for these duties by FIOST clauses,[27] the US Court of Appeals for the Second and Fifth Circuits held that cargo-related operations were inalienable, and as a consequence a FIOST clause was rendered null and void under art.III(8) of the Rules.[28]

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[19] *See Shipping Corporation of India v Gamlen Chemical Co A/Asia Pty Ltd* [1980] 147 CLR. 142 (Austl.); *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd* [1993] 117 ALR 507 (Austl.); *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* [1998] 44 NSWLR 371 (Austl.).

[20] *See BJ Ball New Zealand v. Federal Steam Navigation* [1950] NZLR 954 (N.Z.); *International Ore & Fertilizer Corporation v. East Coast Fertilizer Co Ltd* [1987] 1 NZLR 9 (N.Z.); *Dairy Containers v. The Ship (The Tasman Discoverer)* [2003] 3 NZLR 353 (N.Z.).

[21] *See The New India Assurance Co Ltd v. M/S Splosna Plovba* [1986] AIR Ker 176 (India).

[22] *See East and West Steamship Co v. Hossain Brothers* (1968) 20 PLD SC 15 (Pak.).

[23] *The Saudi Prince (No 2)* [1988] 1 Lloyd's Rep 1.

[24] *The Sea Joy* [1998] 1 SA 487 (S. Afr.).

[25] William Tetley, Marine Cargo Claims 1297-300 (Yvon Blais, 4th ed. 2008)

[26] *De Atlantic Coast* [1991] Nr 15 34. For a detailed analysis of the Dutch approach on the matter see, Djadjev, *supra* note 4, at 107-110.

[27] *See Sumitomo Corp of America v. M/V Sie Kim* (1985) 632 FSupp 824, (United States District Court); *Atlas Assurance Co v. Harper Robinson Shipping Co* (1975) 508 F2d 1381 (9th Circuit); *Sigri Carbon Corp v. Lykes Bros Steamship Co* (1987) 655 FSupp 1435, (United States District Court).

[28] *See Associated Metals Minerals* v. *MV Arktis Sky* (1992) 978 F2d 47 (2nd Circuit) and *Tubacex* v. *MV Risan* (1995) 45 F3d 951 (5th Circuit).

As for the propositions adopted by South African and French and, to some extent, by the US law, as much as they might seem favourable, they do not suggest any mechanism in reinstating the balance between cargo interests and shipowners under the Rules in this sense, as carriers are not allowed to contract out of responsibility at all in the first place.

As regards the other jurisdictions favouring the English approach where carriers may be relieved of liability pursuant to a FIOST clause, the author is not aware of any reported case that has sought to alter the position of cargo interests. That is to say, the laws of these jurisdictions appear to fall short of providing assistance in altering the impact of these clauses.

4. QUEST FOR RE-STRIKING THE BALANCE

By a FIOST clause inserted or incorporated into bills of lading, as is shown in the above sections, it would not be wrong to note that carriers are able to surpass any claim against cargo interests concerning loss arising during cargo-handling operations, which they have taken no part in. It is thought that this bears an undesired outcome that needs revision. Assume that a receiver took delivery of a cargo, which was damaged as a result of improper stowage. Also suppose that a shipper delivered his goods to the shipowner/carrier for shipment, which was also damaged due to bad stowage. Also suppose that in both cases, there was a FIOST clause of a charterparty incorporated into bills of lading, transferring responsibilities to a third party. First, in both scenarios, both the receiver and the shipper could bring a claim against their carriers/shipowners for their respective losses, as it is their carriers that they both had direct contractual proximity with under the bills of lading.

As for the first scenario, the shipowner could relieve himself of responsibility in the light of a FIOST clause incorporated, as the loss in question would result from a third party's, namely the shipper's or the charterer's, actions or negligence. Second, the receiver's recourse *vis-à-vis* the shipper or the charterer would be destined for failure too, as his contractual partner was the shipowner/carrier under the bill of lading rather than the shipper or the charterer. The very same can be said for the second scenario for the shipper against the charterer. In the first scenario, if the shipper or the charterer is a free on board [hereinafter FOB] or a cost, insurance and freight [hereinafter CIF] seller –unless there is a string sale-, the cargo interest as a buyer, indeed might have a direct contractual proximity with either of these parties under the sale contract, and

depending on its terms, he could be able to claim his loss under the sale contract, but not under the carriage contract. This may not be always the case though, as cargo interests often can be said to have been left without a remedy for the matter in question under English law. The *status quo* proves that loss arising from these operations does not fall upon the party that undertakes to perform these obligations, as he is allowed to walk away without liability.[29] It is hence opined that the end result is highly unsatisfactory for cargo interests, and they should therefore have a means of recourse directly or indirectly against the faulty party.

4.1. INTERVENING ACT OF THE SHIPOWNER

The very first question at this point needs answering is whether the shipowner/carrier would be subject to liability, in case he intervened or took some role in the stowage, where these operations were transferred to the charterer via a FIOST clause. It is trite law that regardless of whether it is the charterer who is to perform cargo-handling operations, the shipowner *"is practically bound to play some part in"*[30] in these operations and the master, to some extent, is under a duty to exercise supervision and control over the charterer's performance of these services.[31] If this is the case, then it is plausible to argue that the charterer's responsibility should be limited to the extent of the shipowner's contribution to the loss arising from cargo-related operations. Put simply, if the shipowner intervened with these operations, which contributed to it being improper, he should be liable to a corresponding degree against the bill of lading holder. This argument was embraced in *the Eems Solar* by the learned judge and he subsequently opined that the shipowner should not be relieved of liability for improper stowage, had the stowage plan made by the master and the mate –which failed to provide for the necessary precaution in the case- been followed by the stevedores and their employers. Though he went on to note that there was no evidence showing that the stevedores relied on or paid any attention to this plan in the case. On this ground, it was thus held that the entire responsibility for stowage rested with the charterers via their stevedores and accordingly the damage resulting from the failure to stow the cargo properly could not lead to hold the shipowner responsible.

In *the Eems Solar*, the cargo interests' attempt led to a failure. It was nonetheless only on the ground that there was no evidence that the shipowner intervened with the

[29] For similar criticisms *see* Todd, *supra* note 10. Simon Baughen, *Tripartite Contracts and the Missing Link*, 2004 Lloyd's Mar.& Com. L Q. 129 . Simon Baughen, *Defining the Limits of the Carrier's Responsibilities*, 2005 Lloyd's Mar.& Com. L Q. 153

[30] *Pyrene v. Scindia* [1954] 2 Q.B. 402, 418.

[31] *See generally Court Line Ltd v. Canadian Transport Co Ltd* [1940] AC 934, 944.

stowage or that the stevedores relied on their plan. However, it would not be wrong to argue that *the Eems Solar* left the door ajar for cargo interests' favour; as long as they can prove that the shipowner's intervention has contributed to the loss arising from these operations, shipowners can be held liable for a corresponding degree under the bills of lading. That being said, it might still prove to be difficult to show the intervening actions of the shipowner and their contribution to damage.

4.2. ACTION IN TORT

As shown above, it may not be often easy to prove the shipowner's intervention in these operations, as was the case in *the Eems Solar*. They therefore may need alternative means to fend off this undesired result. As for a claim in tort, the claimant must prove that he had the property in the goods when the damage occurred.[32] The vast majority of commercial vessels carry the goods sold under sale contracts on *shipment terms* –FOB and CIF sales– title to the goods will often pass after shipment such as on delivery or during transit. It is unusual for these sales that property in the goods pass prior to shipment. Therefore, the receiver would have a difficulty in proving that he had proprietary interest in the goods during loading, stowing or trimming operations causing damage to the goods, whereas, the shipper might have a better chance to claim in tort against the charterer performing these operations. On the other hand, for a loss arising during discharge, unless it is undertaken by the receiver, perhaps he might have an arguable claim against the faulty party provided that he establishes that he had the title to the goods at the time damage occurred. However, as *the Starsin*[33] proves, it may not always be encouraged to claim in tort actions, as it could be really challenging and difficult to show that they had the property in the goods at the time the goods were damaged.[34]

Even if shown, they may not be able to recover purely economical losses, which are not loss consequential upon physical damage, which might fall short of the actual damage borne by cargo interests.[35] In order to provide a right of recourse for cargo interests it is therefore important to scrutinise other potential legal devices, which will be examined below.

[32] *See Candlewood Navigation Corporation Ltd v. Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh & Sillivan Ltd v. Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785; [1986] 2 Lloyd's Rep. 1.

[33] *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 AC 715; [2003] 1 Lloyd's Rep. 571.

[34] *Id.*

[35] *See also Candlewood Navigation Corporation Ltd v. Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh & Sillivan Ltd v. Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785; [1986] 2 Lloyd's Rep. 1. For the application and approval of this principle see, *Losinjska Plovidba v. Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep. 395 and *Virgo Steamship Co SA v Skaarup Shipping Corp (The Kapetan Georgis)* [1988] 1 Lloyd's Rep. 352. For a detailed analysis on *the Orjula* see also, Andrew Tettenborn, *Dangerous Cargo: Tort Liability and Environmental Responsibility,* 1996 Lloyd's Mar. & Com. L. Q. 6, 8.

4.3. IMPLIED CONTRACT AND AGENCY PRINCIPLE

Since a claim in tort is challenging and the argument for the shipowner's intervention is not waterproof, a question arises immediately at this point: Is there an alternative means of solution favouring the cargo interest to reverse this undesired outcome? The short answer may not be affirmative, as the English courts have not issued a decision in this context favouring the cargo interest. Nevertheless the Court of Appeal in *the Coral*[36], suggested two propositions to address this issue based on the decision in *Pyrene v Scindia*; first, that the charterer could be deemed as having a contract with the shipper through the agency of the shipowner, and second that an implied contract might come into existence between the charterer and the shipper, once the goods are delivered by the shipper and they accepted by the charterer to perform the operations of loading and stowing.[37] Though the court did not go beyond noting these suggestions, nor did it explain how they would be applicable to the matter in question. The courts so far have not developed any solution in this context. These propositions, therefore, need to be explored and examined to see whether any of them could be a remedy for cargo interests.

4.3.1. AGENCY PRINCIPLE

To start with the agency principle, it would be safe to say that it is no longer considered as good law in the light of the decision of the House of Lords in *the Midland Silicones*[38] and the decision of the Court of Appeal in *the Kapetan Markos*[39] where the agency principle allowing a third party to participate in a contract was laid to rest.[40] It is, therefore, highly doubtful that the agency principle would prove a fruitful solution for cargo interests on the matter.

4.3.2. IMPLICATION OF A CONTRACT

As it is evident from the rulings in Midland Silicones and the Kapetan Markos, the first proposition made in the Coral seems not feasible, as a third party is unable to participate in a contract that was not concluded by him. However, both *Midland Silicones* and the *Kapetan Markos* went on to explain *Pyrene v Scindia* on the grounds of the doctrine of implied contract. It is trite law that the implication of a contract is a matter of fact to be

[36] *Balli Trading Ltd v. Afalona Shipping Co Ltd (The Coral)* [1993] 1 Lloyd's Rep. 1, 7.
[37] *Id.*
[38] *See, e.g.* [1962] AC 446, 471.
[39] *See generally The Kapetan Markos (No 2)* [1987] 2 Lloyd's Rep. 321, 331.
[40] *See also* Only parties to the contract can sue or to be sued thereunder; *Adler v. Dickinson (The Himalaya)* [1955] 1 Q.B. 158, 161, 162. See also, Aikens, *supra* note 4, at 276; Eder, *supra* note 4, at 69.

determined depending on the circumstances of each case.[41] The Court of Appeal in *the Coral* found the implied contract established in *Pyrene v Scindia* between the FOB seller and the shipowner could be analogous to the relationship between the charterer and the shipper. Devlin J in *Pyrene v Scindia* explained the implied contract "by delivering the goods alongside the seller impliedly invited the shipowner to load them, and the shipowner by lifting the goods impliedly accepted that invitation. The implied contract so created . . ." .[42] By way of analogy, it is submitted that a contract can be implied on the ground that the shipper by delivering the goods, could be regarded as inviting the charterer to load and stow them - as these operations are transferred to him by a FIOST clause- and the charterer could also be deemed to be accepting this invitation.

Under English law, a contract can be created as a result of parties' conduct, which could be deemed as offer and acceptance.[43] As was the case in *Pyrene v Scindia*, it is arguable that the shipper's offer of the goods to the charterer and the charterer's acceptance of them for loading, in return may be considered as offer and acceptance. Though in order to infer a contract, alongside offer and acceptance, contractual intention is also a necessary tool.[44] Considering the issue in question, indeed these parties can be said to be acting under another contract and it is not always easy to establish a contractual intention for an implied contract in the light of ordinary contractual principles. Though in *Pyrene v Scindia*, a contract was successfully implied from the conduct of the parties and the implied contract in *Pyrene v Scindia* was embraced by the House of Lords in *Midland Silicones* notwithstanding the lack of contractual intention.[45] In supporting this, case law appears to be proving that a contract could be created, although it was not possible to support its formation in the light of standard offer and acceptance analysis,[46] and that the existence of the implied contract was accepted, even regardless of the actual intention of the parties.[47] Also many learned scholars, like Treitel,[48] Debattista,[49] Lorenzon,[50] as well as the editors of *Chitty on*

[41] *The Elli 2* [1985] 1 Lloyd's Rep. 107, 111.
[42] [1954] 2 Q.B. 402, 426.
[43] *See Hart v. Mills* (1846) 15 LJ Ex 200; *Steven v. Bromley & Son* [1919] 2 K.B. 722; *see Greenmast Shipping Co SA v. Jean Lion et Cie SA (The Saronikos)* [1986] 2 Lloyd's Rep. 277; *see also Confetti Records v. Warner Music UK Ltd* [2003] EWHC 1274 [2003] EMLR 35.
[44] *See e.g., The Aramis* [1989] 1 Lloyd's Rep. 213, 224.
[45] [1962] AC 446, 471.
[46] *See, The Satanita* [1895] P 248; *Clarke v. Dunraven* [1897] AC 59; *The Eurymedon* [1975] AC 154. *See* also *Butler Machine Tool Co Ltd v. Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401.
[47] *See Cremer v. General Carriers SA (The Dona Mari)* [1974] 1 W.L.R. 341.
[48] *See generally* G.H. Treitel, *Bills of Lading and Implied Contracts,* 1989 Lloyd's Mar. & Com. L. Q. 162, 168-72.
[49] *See* Charles Debattista, Bills of Lading in Export Trade 10 (3rd ed. 2008).
[50] *See* Filippo Lorenzon et al., Sassoon on C.I.F. and F.O.B. Contracts 10-52 (6th ed. 2016).

Contracts[51] and *Carver on Bills of Lading,*[52] consider that a *Pyrene* type implied contract is still alive.

The courts, when explaining the underlying ratio for the implication of a contract, have taken a pragmatic approach in order to satisfy commercial expectations.[53] Regardless of the actual intention of the parties, contracts have so far been implied by the courts, when it was necessary to do so[54] and when business efficacy[55] required it. Thus, when a relationship between two parties is not entirely efficacious without the implication of a contract between them, the courts have shown readiness to imply a contract, when other requirements are satisfied.

FIOST clauses arguably have a detrimental impact on the business efficacy, which requires that a party should not be substantially deprived of the benefit that the parties intended him to receive, under the contract.[56] When shippers or consignees are not the charterers, the only document in their hand that provides contractual nexus with the carrier is the bill of lading and they hardly have a say on drafting its terms including the terms that are incorporated from a charterparty in relation to the obligations to load, discharge, stow etc. On the other hand, third party bill of lading holders are usually buyers under CIF and often FOB contracts[57] or sometimes banks who hold those bills as pledge or security in letter of credit transactions. These parties, as consignees, do not conclude the carriage contract contained in the bills of lading, never negotiate or draft its terms or never see the bill of lading until it is transferred, but only purchase the carriage contract which includes the terms that are incorporated from a charterparty.

Therefore, they purchase a carriage contract under which they may not be able to recover their losses from the shipowner as a result of a clause permitting the shipowner to reallocate the obligations of art.III(2). Loss or damage to the cargo is not uncommon in practice, and art.III(2) is one of the most frequently resorted provisions of the Rules by

[51] *See e.g.*, Hugh Beale, Chitty on Contracts 190 (32d ed. 2017).
[52] Treitel, *supra* note 48, at 314.
[53] *See The Satanita* [1895] P 248; *Clarke v. Dunraven* [1897] AC 59; *The Eurymedon* [1975] AC 154. *See* also *Butler Machine Tool Co Ltd v. Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401.
[54] *See The Aramis* [1989] 1 Lloyd's Rep. 213, 224.
[55] *Id.*
[56] *See Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26, 70.
[57] Particularly under the second and third type of FOB contracts, where the buyer is not considered the shipper of the goods; *see Pyrene & Co. v. Scindia Navigation Co* [1954] 2 Q.B. 402; *Wimble v. Rosenberg & Sons* [1913] 3 KB 743; *The El Amria and The El Minia* [1982] 2 Lloyd's Rep 28; *Concordia Trading BV v. Richco International Ltd* [1991] 1 Lloyd's Rep 475; *Scottish & Newcastle Int Ltd v. Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 1 Lloyd's Rep 462. For more detailed analysis on FOB contracts *see e.g.*, Guenter Treitel, *C.I.F. Contracts, in* Benjamin's Sale of Goods, ch. 19 (10th ed. 2017); Lorenzon, *supra* note 50, at 247; Debattista, *supra* note 49, at 8; Michael Bridge, The International Sale of Goods 89 (4th ed. 2017); Paul Todd, Cases and Materials on International Trade Law 94 (1st ed. 2003); Carole Murray et. al., Schmitthoff: The Law and Practice of International Trade 21 (12th ed. 2012); Andrea Lista, International Commercial Sales: The Sale of Goods on Shipment Terms 23 (2018).

cargo interests. Under these circumstances, cargo interests can be said to have been deprived of its business effect, as the protection provided by art.III(8) is also undermined.

As explained above, cargo interests appear to be left without a right of recourse unjustly, as a result of a FIOST clause incorporated into the bill of lading shifting the responsibility of the cargo-related operations to the charterer. It is submitted that it is entirely unsatisfactory and commercially inconvenient, since the charterer as the source of defect is allowed to escape liability and cargo interests are substantially deprived of the benefit that they are intended to receive under the contract. The author by no means proposes challenging the law that the shipowner is entitled to contract out these responsibilities. The problem is however concentrated on the loophole created as a result of FIOST clauses that the party who transferred these duties enjoys lack of liability, while he should also face consequences of these responsibilities. On this ground, the relationship between the charterer and the cargo interest is not entirely efficacious without the existence of an implied contract. Therefore, based on the principles of commercial necessity and business efficacy, the author promotes that a contract should be implied as analogous to *Pyrene* and used as a legal device in order to establish a right of recourse for cargo interests.

4.3.2.1. TERMS OF THE IMPLIED CONTRACT

Existence of an implied contract between these parties does not suffice to make the charterer responsible though. The question, therefore, remains as to what are the terms of this contract so as to see whether the charterer could be subject to liability. In general terms, it is trite law that although it is implied as a separate contract, it is accepted that it comes into existence on the bill of lading terms.[58] In *Pyrene v Scindia,* Devlin J noted "[t]he implied contract so created must incorporate the shipowner's usual terms . . . "[59] He went on to find that "they enter into upon . . . which they know or expect the bill of lading to contain" and the *Hague Rules* were considered "usual in the trade".[60] Eventually, Devlin J held that the implied contract was assumed to incorporate the Rules and accordingly the carrier was entitled to trigger the package limitation provisions *vis-à-vis* the seller. As for the issue in question, assuming that a contract is implied between the shipper and the charterer, a question therefore arises immediately at this point: would

[58] *See Brandt v. Liverpool, Brazil & River Plate Steam Navigation Co* [1924] 1 K.B. 575; *See also Pyrene v. Scindia* [1954] 2 Q.B. 402; *The Elli 2* [1985] 1 Lloyd's Rep. 107.
[59] [1954] 2 Q.B. 402, 426.
[60] *Id.* Provided that the Hague or the Hague Visby Rules are incorporated by a paramount clause in the bill of lading.

the shipper be able to trigger art.III(2) which reads ". . . the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"?

The Rules were found applicable in *Pyrene v Scindia* between the shipowner and the FOB seller who was not the shipper in the bill of lading, despite the fact that art.I(a) prescribes " "Carrier" and includes the owner or the charterer who enters into a contract of carriage with a shipper". It was evident in *Pyrene v Scindia* that the carrier in fact entered into a contract with the buyer who was the real shipper, not with the seller. It is not easy to accommodate the terms of the implied contract between its parties. As was the case in *Pyrene v Scindia*, the courts however showed some readiness to read its terms with more flexible approach and equally applied some verbal manipulation to give proper effect to the Rules thereunder. On this ground with some verbal manipulation, it would not be entirely implausible to argue that art.III(2) would be triggered by the shipper against the charterer under the implied contract, particularly with the support of art.I(a) in which it reads; " "Carrier" includes [. . .] the charterer[. . .]". Indeed, the charterer is not the real carrier under the bill of lading in respect of the matter in question. Although the seller in *Pyrene v Scindia* was not the real shipper under the bill of lading either, the *Hague Rules* applied between them regardless.

Some additional support -perhaps surprisingly- could be found in FIOST clauses. As stated above, it is common ground that the implied contract is on the bill of lading terms. A question arises at this point as to whether a FIOST clause that is incorporated into the bill of lading from a charterparty transferring the cargo-related responsibilities to a third party, such as the charterer, would be incorporated into the implied contract. In *The Elli 2*, there was a bill of lading incorporating charterparty terms including demurrage clauses. In the Court of Appeal, it was held that the contract implied was on the bill of lading terms which also included the incorporated clauses from the charterparty, accordingly, the shipowner was found entitled to demurrage under the implied contract.[61] On the basis of *The Elli 2,* provided that there is an incorporation clause in the bill, there is no reason why a FIOST clause of a charterparty should not be incorporated into the implied contract. If this proposition is correct, then a clause that deprives the cargo interest of having a recourse under the bill of lading contract might arguably give rise to a right to recovery under the implied contract against the charterer who is the source of defect. Assuming that a bill of lading incorporated a widely used FIOST clause, such as clause 5 of the Gencon 1994 Charterparty which reads:

[61] *See The Elli 2* [1985] 1 Lloyd's Rep. 107, 112 and 116.

> 5. Loading/Discharging (a) Costs/Risks
>
> The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured by the Charterers, free of any risk, liability and expense whatsoever to the Owners. The Charterer shall provide and lay all dunnaged material as required for the stowage and protection of the cargo onboard, the Owners allowing the use of all dunnaged available on board.

Once successfully incorporated into the implied contract on the basis of *The Elli 2,* without applying art.III(2), perhaps it might be argued that the shipper would put such a FIOST clause in use in his favour against the charterer, as it makes it clear that the risk of these operations and responsibilities fall on the "charterer". On the other hand, as for the receiver, it is submitted that it is doubtful whether the implication of a contract would provide any assistance. By virtue of the Carriage of Goods by Sea Act 1992, contractual rights and liabilities under the bill of lading[62] are transferred to receivers.

However, it does only transfer rights and liabilities of the original contract contained in the bill of lading. It is not plausible to argue that the Act also transfers rights and liabilities under a separate implied contract to a receiver. There is no reported case supporting this inference either. One argument would be through suggesting a similar proposition that a contract could be implied between the receiver and the charterer[63] by way of analogy with *Brandt v Liverpool.*

For a couple of reasons, it is however unlikely that a contract can be implied between the receiver and the charterer. First, it is often the receiver that undertakes to perform discharge, not the charterer. Once this is the case, if the fault during discharge lies with the receiver causing damage to his own goods, the charterer will not be subject to any liability. Second, even if the entire cargo-handling operations are performed by the charterer, it is doubtful whether a *Brandt v Liverpool* type implied contract would arise between the receiver and the charterer, particularly on the basis that its application is restricted by some authorities.[64] In *Brandt v Liverpool*, a contract was successfully implied between the carrier and the receiver on delivery of the goods against production of the bills of lading. Although, to imply such a contract there should also be a financial consideration moving from the receiver such as payment of freight or demurrage etc. Even if these operations are to be carried out by the charterer, pursuant to a FIOST clause, the receiver will be technically considered as demanding his goods from the

[62] As well as under seaway bills and delivery orders by virtue of Section 1 (b) and (c).
[63] Or the shipper depending on the wording of FIOST clause.
[64] *See The Owners of Cargo Iately Laden on Board the Ship Aramis v. Aramis Maritime Corp (The Aramis)* [1989] 1 Lloyd's Rep. 213; *See, e.g., Mitsui & Co Ltd v. Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311. *Seealso The Aliakmon* [1986] 2 W.L.R. 902.

carrier/the shipowner to whom the receiver will present the bill of lading. One may argue against this, as there is some authority indicating that a contract can be implied, even if no document is tendered in exchange for the discharge of the goods.[65] Even in case of this, it would be still doubtful that there could be any payment for freight or any other charges made to the charterer by the receiver. Therefore, unlike the shipper, the implication of a contract would unlikely be of any assistance to the receiver in creating a right of recourse *vis-à-vis* the charterer. One practical solution could be that the shipper might sue the charterer on behalf of the receiver under the implied contract that would come into existence between him and the charterer on the grounds advocated above.

4.4. ANALOGY WITH TRANSHIPMENT CASES

It is argued above that a *Pyrene* type implied contract could be a useful tool in providing a right of recourse for shippers against charterers. To fend off the detrimental impact of FIOST clauses on cargo interests, developing alternative legal devices might be necessary, given that the suggestions put forward above have yet to be tested before the courts and they may fall short in providing a right of recourse against the faulty party. Therefore, an alternative suggestion is submitted by way of analogy with the cases where transhipment occurred.

When a cargo is shipped under a through bills of lading for an intercontinental route, due to practical reasons, sometimes the contractual carrier may not undertake to perform the entire voyage but transship the cargo on a vessel that is to complete the remaining sea leg.[66] When this is the case, the contractual carrier sub-contracts with a carrier that is to perform the actual carriage. Though, this does not necessarily mean that the contractual carrier would be able to disclaim any liability after transhipment, for the remaining part of the voyage, which is to be carried out by the actual carrier, as there is a *dicta* in the *Holland Colombo* suggesting otherwise.[67] According to *dicta* of Privy Council in the *Holland Colombo*, a clause relieving the contractual carrier of responsibilities arising from loading, stowage, discharge after transhipment is of doubtful validity. Therefore, a bill of lading holder will be entitled to bring an action against the contractual carrier for the damage done to his cargo after transhipment

[65] *Cf. The Elli 2* [1985] 1 Lloyd's Rep. 107.

[66] The holder of the bill of lading will be able to have action *vis-à-vis* the contractual carrier for the entire voyage, as the bill will provide a continuous documentary cover; *see Hansson v. Hamel & Horley* [1922] AC 36, 46 in which the House of Lords followed *Landauer & Co v. Craven and Speeding Bros* [1912] 2 K.B. 94. *See also* Benjamin, *supra* note 57, at 19-027; Debattista, *supra* note 49, at 7.14.

[67] *Cf. Holland Colombo Trading Society Ltd v. Alawdeen* [1954] 2 Lloyd's Rep. 45, 53-54.

under a through bills of lading. The contractual carrier, however, will be able to claim indemnity from the actual carrier.

This might be of some assistance to the matter in question by way of analogy. Suppose that a FIOST clause of a charterparty allowing the shipowner to contract out his cargo-related obligations was incorporated into the bill of lading. He would be able to disclaim any liability arising from these operations, as he successfully transferred them to the charterer. Also, suppose that a contractual carrier sub-contracted for transhipment with an actual carrier who would perform the remaining leg and the cargo was damaged after transhipment due to improper stowage, which was undertaken by the actual carrier. In the latter example, in light of *dicta* in the *Holland Colombo,* the contractual carrier would remain liable for the improper stowage performed by his agent, the actual carrier after transhipment, even if there was a clause under the bill of lading relieving the contractual carrier from any liability concerning cargo-related operations, such as bad stowage. If this is the correct statement of the law, it is difficult to see that the carrier in the former example would enjoy contracting out these operations through a FIOST clause, and as a consequence would be relieved of liability, whereas the carrier in the second example would not, regardless of the existence of a similar clause disclaiming liabilities. Perhaps one plausible explanation would be that the contractual carriers are entitled to indemnity from their agents, actual carriers, for liabilities arising after transhipment, such as the ones arising from improper stowage. As for the matter in question, it is submitted that by way of analogy with the *dicta* in the *Holland Colombo*, once sued by the cargo interest, the shipowner could be allowed to claim indemnity from the charterer, if the charterer was deemed as agent of the shipowner in performing these operations, as is the case in transhipment cases. This would hardly do any harm to the shipowner's freedom of contract concerning the scope of the services that he would want to undertake, and on the contrary, it would be lawfully and commercially more convenient; first, because cargo interests would not be unjustly left without a remedy; second the risk of these operations would ultimately stay with the party that undertakes to perform them, namely the charterer.[68]

[68] Depending on the wording used in the FIOST clause, it could be the shipper as well.

5. CONCLUDING REMARKS

The burden of this paper has been to suggest solutions in order to revise the undesired outcome of FIOST clauses in the bill of lading over cargo interests under English law, not to challenge the law established that the parties are free to negotiate or draft their own terms under their contract. Having said that, such clauses, as argued throughout the paper, might create a loophole in favour of the party that undertakes to carry out these services, and as a consequence, allow them to escape liability. The outcome evidently has a detrimental impact over the business efficacy of the bill of lading, which requires that a party should not be deprived of substantially the benefit that the parties intended him to receive thereunder.

In an attempt to alter the impact of FIOST clauses, several propositions have been discussed above. Among these propositions, it is eventually submitted by the author that the two of them, -the implication of a contract and the analogy with transshipment- cases appear to be the most plausible legal devices that could be successfully put in use before the courts in order to establish a right of recourse for cargo interests. Indeed, these devices have yet to be tested before the English courts.

Nevertheless, it is thought that whoever is undertaking to carry out these obligations should also bear the consequences. Therefore, it is strongly opined by the author that the courts should show readiness to embrace these two devices to alter the displeasing result borne by cargo interests, as these two advocated devices may produce commercially and lawfully more convenient outcomes without confronting the freedom to contract out these responsibilities via FIOST clauses.